

No. 3610

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TOYO KISEN KAISHA et al.,

Appellants,

vs.

CHARLES D. WILLITS and I. L. PATTERSON et al.,

Appellees.

APPELLANTS' PETITION FOR A REHEARING.

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*To the Honorable William B. Gilbert, Presiding Judge,
and the Associate Judges of the United States Circuit
Court of Appeals for the Ninth Circuit:*

We respectfully and urgently request a rehearing. We hesitate to suggest that the court overlooked a vital point in the case, but as the opinion does not refer to it, this conclusion is forced upon us.

Appellees claim damages by reason of the leakage of cocoanut oil occurring through the negligence of appellant in stowing the barrels containing the cocoanut oil in a hold too near the engine room of the vessel.

Appellants assert that the leakage occurred through insufficiency of the barrels to retain the oil. *There is*

no discussion of this point in the opinion although it was the point principally discussed in the briefs and argument.

The bill of lading contains an exception against liability for leakage. With such an exception in the bill of lading, a shipper cannot recover damages from a shipowner for leakage, unless he shows that the damage would not have occurred but for the negligence of the shipowner (the "Folima", 212 U. S. 354; 53 L. E. 546).

We respectfully but emphatically assert that the leakage would not have occurred but for the negligence of the appellees in putting the oil in insufficient containers. For this the shipowner is not liable (Carver, Carriage by Sea, Fifth Edition, Section 14). *The uncontradicted evidence establishes that some of the barrels came out of the vessel's hold full, some empty and some partly empty.* The fact that some of the barrels came out *full* conclusively establishes three things as to those barrels: First, that those barrels were sufficiently strong and tight to retain their contents; second, that there was no negligence on the part of appellant Toyo Kisen Kaisha as to the stowage of those barrels, and third, that there was no negligence on the part of the shipper in putting the coconut oil in these sufficient containers.

What does that establish as to those barrels which came out *half full* and those which were *empty*? Simply and only that they were not sufficient. If they had

been as strong and tight as the full barrels, they must have come from the hold in the same condition. The conclusion, therefore, is inevitable that no damage could have happened but for the insufficient containers, and for this the shipowner is not liable.

There is no mention in the opinion of this vital and turning point of the case.

The testimony upon the point is uncontradicted. The witnesses testified that some of the barrels came out full, some partly full and some empty.

Dunn, witness for appellees, testifies (Apostles p. 290):

“Q. Did you go up alongside the barrels as they came out of No. 5 tank? A. Yes.

Q. Some of them had the heads stove in?

A. Yes.

Q. There were various conditions of fullness?

A. Yes.

Q. Some empty, were they? A. Some empty.

Q. Some half full? A. Some half full.

Q. And some full? A. Exactly.”

Barry, a stevedore, testifies (Apostles p. 129):

“Q. What was the condition of the barrels that came out of No. 5?

A. They were pretty nearly the same as No. 7, all leaking.

Q. All leaking? A. Yes.

Q. Some empty? A. Some empty, yes.

Q. And some full? A. Some full.”

Witness Chapin testifies (Apostles p. 99):

“Q. The condition was substantially the same?

A. All down the line, yes.

Q. Some barrels were full?

A. Some barrels were full.

Q. And some empty?

A. Some empty, some partly empty."

Of course the inference would seem to be inescapable that the barrels which came out full were sufficient, and that those which came out empty or partially empty were wholly or partially insufficient, but to make assurance doubly sure, the witnesses so testified.

Captain Curtis testifies (Apostles p. 282):

"Q. If a cargo of cocoanut oil comes out of holds 5 and 7, some with the barrels full, some empty, and some partially full, what does that indicate, in your mind?

A. That some of the containers were not good enough."

And again, witness Murray testifies (Apostles p. 278):

"Q. Assume, Mr. Murray, that the cargo of cocoanut oil stowed in barrels in both hold 5 and hold 7, some of them came out empty, some partially empty, and some full, what explanation would you give for that?

A. That the barrels that retained their contents possessed sufficient strength for the purpose for which they were intended, and those that did not retain their contents lacked the strength.

That the barrels were found there, some partially full, others empty, and others apparently entirely full, in my opinion, is evidence that some of the barrels contained the requisite strength in all parts, some of them only in parts, and some of them lacked the strength where they needed it most."

As bearing upon and reinforcing the importance of this point and its vital bearing upon the case of the appellant, we may refer to the statement by the Supreme Court in

Nelson v. Woodruff, 66 U. S. 156; 17 L. Ed. 97, wherein it is virtually held that a shipper of such a commodity in wooden containers assumes the risk of leakage. The court says:

“When the contents of such barrels are solidified, the leakage will be small; when liquified, large. * * * From its liquidity, the ordinary barrels for the transportation of tallow and grease were found to be insufficient, as the casks were frequently half empty on their arrival. The commerce in it was checked for some years, and not resumed until the shippers put it into square boxes lined with tin, and the article is now carried without loss. * * * We have now shown that a cause of the leakage of lard is its liquefaction under temperatures higher than those at which it will solidify, when deficient in stearine. One legal consequence of this fact is that shippers of that article should be considered as doing so very much as to leakage at their own risks when it is in a liquid state, however that may have been caused, either from fire or the heat of the sun, and knowing, too, that it was to be carried by sea at a time from places where there was a high range of heat, through latitudes where the heat would not be less, until the ship had made more than three-fourths of her passage.” (The contents of these barrels was liquid when they went on board the vessel.)

We believe this point deserves the fullest consideration and we are confident that the court will not deny

us a deliberate and extended hearing upon so vital a point.

Dated, San Francisco,
August 10, 1921.

SAMUEL KNIGHT,
F. ELDRED BOLAND,
KNIGHT, BOLAND, HUTCHINSON & CHRISTIN,
*Attorneys for Appellants
and Petitioners.*

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellants and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
August 10, 1921.

F. ELDRED BOLAND,
*Of Counsel for Appellants
and Petitioners.*